

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 127

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UNITED STATES, PETITIONER

*vs.*

CHARLES E. O'MALLEY, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

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**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

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No. 58C76

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[File Endorsement Omitted]

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**CHARLES E. O'MALLEY, CLAUDE C. ALEXANDER and PETER  
G. FARROW, as Executors of the Will of Edward H.  
Fabrice, Deceased, PLAINTIFFS,**

*vs*

**THE UNITED STATES OF AMERICA, DEFENDANT**

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**COMPLAINT—Filed January 15, 1958**

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The plaintiffs, CHARLES E. O'MALLEY, CLAUDE C. ALEXANDER and PETER G. FARROW, as Executors of the Will of Edward H. Fabrice, Deceased, by their attorneys, THOMPSON, RAYMOND, MAYER, JENNER & BLOOMSTEIN, complain of the defendant and aver as follows:

(1) This action is for refund of the federal estate tax paid to defendant by plaintiffs, as Executors of the Will of Edward H. Fabrice, Deceased, and this action arises under the Internal Revenue Code of 1939 (former 26 U.S.C., Sec. 1, et seq). This court has jurisdiction on this action under 28 U.S.C., Sec. 1346.

(2) Plaintiffs are residents of the Northern District of Illinois.

(3) Edward H. Fabrice (herein referred to as "Fabrice") died a resident of Chicago, Cook County, Illinois, [fol. 5] on October 13, 1949. Prior to his death Fabrice had created five irrevocable trusts, naming himself as a co-trustee of each. Two of the five trusts were created on December 21, 1936—one (herein referred to as "Janet Fabrice Trust No. 1") for the benefit of his daughter Janet, and the other (herein referred to as "Lorraine Fabrice Trust No. 1") for the benefit of his daughter Lorraine. The remaining three trusts were created on January 20, 1937—one (herein referred to as "Janet Fabrice Trust No. 2") for the benefit of his daughter Janet, another (herein referred to as "Lorraine Fabrice Trust No. 2") for the benefit of his daughter Lorraine, and the last (herein referred to as "Martha G. Fabrice Trust") for the benefit of his wife Martha. Copies of each of the five trust agreements are attached hereto as Exhibits "A" through "E".

(4) Upon the creation of the Janet Fabrice Trust No. 1, Fabrice transferred to it seventy-five (75) shares of a closely-held Illinois corporation, then known as Fabart Company, and now known as Fabart Instrument Company. No other property was ever transferred by Fabrice to that trust. Income earned by that trust from its creation through October 13, 1949, was as follows:

[fol. 6]

	Dividends Received	Interest Received On Bonds Purchased By The Trustees From Income
1937	\$6,150.00	
1938		\$ 322.87
1939	3,000.00	107.63
1940	5,250.00	
1941	5,880.00	
1942	7,480.00	120.00
1945	2,805.00	208.68
1946	5,610.00	208.68
1947		208.68
1948		208.68
1949	2,805.00	
	<hr/> \$38,980.00	<hr/> \$1,385.22
		TOTAL INCOME.....\$40,365.22



With a portion of that income, the following additional shares of Fabart Company were purchased by the Trustees at \$100.00 per share:

On February 8, 1939—30 shares  
 On February 9, 1940—42 shares  
 On March 6, 1941 —40 shares

The total price paid for these 112 shares was \$11,200.00, which, when added to the amounts distributed and otherwise expended by that trust until Fabrice's death, equalled \$39,559.93. The total income of the Janet Fabrice Trust No. 1 of \$40,365.22, less \$39,559.93 in disbursements, left cash on hand as of October 13, 1949, of \$805.29.

(5) Upon the creation of the Lorraine Fabrice Trust No. 1, Fabrice transferred to it seventy-five (75) of Fab-[fol. 7] art Company. No other property was ever transferred by Fabrice to that trust. Income earned by that trust from its creation through October 13, 1949, was as follows:

	Dividends Received	Interest Received On Bonds Purchased By The Trustees From Income
1937	\$6,150.00	\$
1939	3,000.00	
1940	5,250.00	
1941	5,880.00	
1942	7,480.00	120.00
1945	2,805.00	
1946	5,610.00	
1949	2,805.00	
	<hr/>	<hr/>
	\$38,980.00	\$ 120.00
TOTAL INCOME.....		\$39,100.00

With a portion of that income, the following additional shares of Fabart Company were purchased by the Trustees at \$100.00 per share:

On February 8, 1939—30 shares  
 On February 9, 1940—42 shares  
 On March 6, 1941 —40 shares

The total price paid for these 112 shares was \$11,200.00, which, when added to the amounts distributed and

otherwise expended by that trust until Fabrice's death, equaled \$31,484.05. The total income of the Lorraine [fol. 8] Fabrice Trust No. 1 of \$39,100.00, less \$31,484.05 in disbursements, left cash on hand as of October 13, 1949, of \$7,615.95.

(6) Upon the creation of the Janet Fabrice Trust No. 2, Fabrice transferred to it 101 shares of Fabart Company. No other property was ever transferred by Fabrice to that trust. Income earned by that trust from its creation through October 13, 1949, was as follows:

	Dividends Received	Interest Received On Bonds Purchased By The Trustees From Income
1937	\$ 8,282.00	\$
1938		434.85
1939	4,040.00	144.89
1940	7,050.00	
1941	7,880.00	
1942	10,120.00	84.00
1943		252.00
1945	3,795.00	77.23
1946	7,590.00	32.83
1947		15.12
1948		15.12
1949	3,795.00	
	<hr/> \$52,552.00	<hr/> \$1,056.04
TOTAL INCOME.....		\$53,608.04

With a portion of that income, the following additional shares of Fabart Company were purchased by the Trustees at \$100.00 per share:

[fol. 9]

On March 7, 1939 —40 shares  
On February 9, 1940—56 shares  
On March 6, 1941 —56 shares

The total price paid for these 152 shares was \$15,200.00, which, when added to the amounts distributed and otherwise expended by that trust until Fabrice's death, equaled \$40,620.32. The total income of the Janet Fabrice Trust No. 2 of \$53,608.04, less \$40,620.32 in dis-

bursements, left cash on hand as of October 13, 1949, of \$12,987.72.

(7) Upon the creation of the Lorraine Fabrice Trust No. 2, Fabrice transferred to it 101 shares of Fabart Company. No other property was ever transferred by Fabrice to that trust. Income earned by that trust from its creation through October 13, 1949, was as follows:

	<u>Dividends Received</u>	<u>Interest Received On Bonds Purchased By The Trustees From Income</u>
1937	\$ 8,282.00	\$
1939	4,040.00	
1940	7,050.00	
1941	7,880.00	
1942	10,120.00	382.50
1943		252.00
1945	3,795.00	
1946	7,590.00	
1949	3,795.00	
	<u>\$52,552.00</u>	<u>\$ 634.50</u>

TOTAL INCOME.....\$53,186.50

[fol. 10] With a portion of that income, the following additional shares of Fabart Company were purchased by the Trustees at \$100.00 per share:

On March 7, 1939 —40 shares  
On February 9, 1940—56 shares  
On March 6, 1941 —56 shares

The total price paid for these 152 shares was \$15,200.00, which, when added to the amounts distributed and otherwise expended by that trust until Fabrice's death, equaled \$40,589.15. The total income of the Lorraine Fabrice Trust No. 2 of \$53,186.50, less \$40,589.15 in disbursements, left cash on hand as of October 13, 1949, of \$12,597.35.

(8) Upon the creation of the Martha G. Fabrice Trust, Fabrice transferred to it 101 shares of Fabart Company. No other property was ever transferred by Fabrice to that trust. Income earned by that trust from its creation through October 13, 1949, was as follows:

Dividends Received

1937	\$ 8,282.00
1939	4,040.00
1940	7,050.00
1941	7,880.00
1942	10,120.00
1945	3,795.00
1948	7,590.00
1949	3,795.00

TOTAL INCOME.....\$52,552.00

[fol. 11] With a portion of that income, the following additional shares of Fabart Company were purchased by the Trustees at \$100.00 per share:

On March 7, 1939   —40 shares  
On February 9, 1940—56 shares  
On March 6, 1941   —56 shares

The total price paid for these 152 shares was \$15,200.00, which, when added to the amounts distributed and otherwise expended by that trust until Fabrice's death, equaled \$40,212.15. The total income of the Martha G. Fabrice Trust of \$52,552.00, less \$40,212.15, left cash on hand as of October 13, 1949, of \$12,339.85.

(9) During his lifetime, Fabrice leased from his daughter Janet, two Wisconsin farms which were beneficially owned by her. Fabrice also leased from his daughter Lorraine, one Wisconsin farm which was beneficially owned by her. Fabrice, as a tenant, erected certain buildings and other improvements on such farms. Rent was paid by Fabrice for those farms. The recipient of that rental income reported it on federal income tax returns and took deduction on those returns for depreciation on such improvements.

(10) After the death of Fabrice, plaintiffs were duly qualified on November 3, 1949, by the Probate Court of Cook County, Illinois, as Executors of Fabrice's will and [fol. 12] entered upon their duties as such. On February 12, 1951, plaintiffs filed for the Estate of Fabrice a federal estate tax return, properly executed, showing no federal estate tax due. On February 2, 1954, the Commissioner of Internal Revenue determined that the estate tax

liability of the Estate of Fabrice was \$80,726.36, and assessed a deficiency in estate tax of that amount. The major items added to Fabrice's gross estate by the Commissioner were as follows:

(a) *Janet Fabrice Trust No. 1*

112 shares of Fabart Company stock given to the trust by Fabrice		
75 shares of purchased Fabart Company stock		
187 shares at \$200 each.....	\$37,400.00	
Cash .....	805.29	\$38,205.29

(b) *Lorraine Fabrice Trust No. 1*

112 shares of Fabart Company stock given to the trust by Fabrice		
75 shares of purchased Fabart Company stock		
187 shares at \$200 each.....	\$37,400.00	
Cash .....	7,615.95	\$45,015.95

(c) *Janet Fabrice Trust No. 2*

101 shares of Fabart Company stock given to the trust by Fabrice		
152 shares of purchased Fabart Company stock		
253 shares at \$200 each.....	\$50,600.00	
Cash .....	12,987.72	\$63,587.72

[fol. 13]

(d) *Lorraine Fabrice Trust No. 2*

101 shares of Fabart Company stock given to the trust by Fabrice		
152 shares of purchased Fabart Company stock		
253 shares at \$200 each.....	\$50,600.00	
Cash .....	12,597.35	\$63,197.35

(e) *Martha G. Fabrice Trust*

101 shares of Fabart Company  
stock given to the trust by  
Fabrice

152 shares of purchased Fabart  
Company stock

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253 shares at \$200 each.....	\$50,600.00	
Cash .....	12,339.85	
Plus an amount not identi- fied in the deficiency letter, but equal to .....	3,795.00	\$66,734.85

(f) Farm Improvements .....

37,000.00

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\$313,741.16

On August 5, 1954, plaintiffs paid to the Director of Internal Revenue in Chicago, Illinois, the amount of the claimed deficiency in federal estate tax, together with interest of \$16,774.49, for a total of \$97,500.85.

(11) On August 3, 1956, plaintiffs filed with the District Director of Internal Revenue in Chicago, Illinois, a properly executed claim for refund of the \$97,500.85 paid as federal estate tax and interest. By said claim, plaintiffs asked refund of the amount of tax and interest [fol. 14] paid upon the ground that the entire corpus of each of the five trusts herein referred to was erroneously included in Fabrice's estate under Section 811(c) (1) (B) (ii) and/or Section 811 (d) (1) of the 1939 Internal Revenue Code. In briefs filed with the Director in support of the claim, plaintiffs argued that—

A. The entire corpus of each trust, including the accumulated income (whether re-invested or in cash), should be excluded from the gross estate because the power under each trust to accumulate income was and is governed by a definite external standard;

B. The accumulated income portion of the corpus of each trust (whether re-invested or in cash), as distinguished from the original principal transferred by Fabrice, was erroneously included in the gross estate, for such income was not "transferred" by Fabrice; and

C. The farm improvements were erroneously included in Fabrice's estate under Section 811(c) (1) (B) (i), for Fabrice did not retain the "possession or enjoyment" of such improvements.

[fol. 15] (12) On April 24, 1957, the District Director disallowed the claim of plaintiffs, whereupon plaintiffs filed a protest, with supporting briefs, again stating their position. On September 24, 1957, the Office of the Regional Commissioner sent to plaintiffs a notice of formal disallowance of their claim.

(13) For the reasons stated in Subparagraphs "A" through "C" of Paragraph (11) hereof, the assessment by the Commissioner against the estate of Fabrice of the alleged deficiency in federal estate tax referred to in this complaint was erroneous and excessive, and the collection by the Commissioner of that tax, together with the interest thereon, was also erroneous.

(14) Plaintiffs have incurred and will incur attorneys' fees in the prosecution of their claim for refund and in the prosecution of this suit for refund of federal estate taxes. The amount of such fees are not at this time determined, but such fees are a proper administrative expense which should be deducted from the gross estate of Fabrice in the ultimate determination of estate tax, if any.

WHEREFORE, plaintiffs demand judgment in their favor and against the defendant—

[fol. 16] (a) In the amount of \$97,500.85, plus interest to date; or

(b) For such amount less than \$97,500.85, plus interest to date, as the Court may find proper, but in such case the amount of the ultimate recovery to reflect as a deduction from the gross estate of Fabrice the attorneys' fees incurred by plaintiffs in

presenting their claim to the District Director and in prosecuting this suit; and

(c) For such other relief as may be proper.

/s/ Max Bloomstein, Jr.

/s/ Addis E. Hull

/s/ Leon Fieldman

Thompson Raymond Mayer Jenner & Bloomstein  
135 South LaSalle Street  
Chicago-3, Illinois.  
Randolph 6-0220

*Of Counsel*

[fols. 17-50] \* \* \*

[fol. 51]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

[File Endorsement Omitted]

[Title Omitted]

ANSWER—Filed March 17, 1958

Comes now the defendant, United States of America, by its attorneys, Robert Tieken, United States Attorney for the Northern District of Illinois, and Donald S. Lowitz, Assistant United States Attorney, and for its answer to plaintiffs' complaint alleges as follows:

1. Admits the allegations contained in paragraph 1 of plaintiffs' complaint, except to deny that plaintiffs are entitled to the refund they seek.



2. Admits the allegations contained in paragraph 2 of plaintiffs' complaint.

3. Admits the allegations contained in paragraph 3 of plaintiffs' complaint, except to deny that the trusts referred to therein were irrevocable.

4. Admits the 1st sentence of paragraph 4 of plaintiffs' complaint. Denies information sufficient to form a belief [fol. 52] as to the truth of all other matters alleged in paragraph 4, except to admit that the Janet Fabrice Trust No. 1 had cash on hand as of October 13, 1949, of \$805.29.

5. Admits the 1st sentence of paragraph 5 of plaintiffs' complaint. Denies information sufficient to form a belief as to the truth of all other matters alleged in paragraph 5, except to admit that the Lorraine Fabrice Trust No. 1 had cash on hand as of October 13, 1949, of \$7,615.95.

6. Admits the 1st sentence of paragraph 6 of plaintiffs' complaint. Denies information sufficient to form a belief as to the truth of all other matters alleged in paragraph 6, except to admit that the Janet Fabrice Trust No. 2 had cash on hand as of October 13, 1949, of \$12,987.72.

7. Admits the 1st sentence of paragraph 7 of plaintiffs' complaint. Denies information sufficient to form a belief as to the truth of all other matters alleged in paragraph 7, except to admit that the Lorraine Fabrice Trust No. 2 had cash on hand as of October 13, 1949, of \$12,597.35.

8. Admits the 1st sentence of paragraph 8 of plaintiffs' complaint. Denies information sufficient to form a belief as to the truth of all other matters alleged in paragraph 8, except to deny that the Martha G. Fabrice trust had cash on hand as of October 13, 1949 of \$12,339.85.

[fol. 53] 9. Denies information at this time sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of plaintiffs' complaint, except to admit that Fabrice paid rent for the farms and erected buildings on them, and to deny the last sentence of paragraph 9.

10. Admits the allegations contained in the first three sentences of paragraph 10 of plaintiffs' complaint, except to allege that the deficiency referred to was assessed on June 30, 1954, rather than February 2, 1954, as alleged.

Admits that the major items added to Fabrice's gross estate totaled \$313,741.61 as alleged, but denies that the

complaint sets out the particulars of said total correctly in paragraphs (a) through (f).

Admits the last sentence of paragraph 10, except to allege that the payments were made on August 6, 1954.

11. Admits the allegations contained in paragraph 11 of plaintiffs' complaint, except to deny that plaintiffs' alleged grounds for claiming a refund entitle them to the relief they seek.

12. Admits the allegations contained in paragraph 12 of plaintiffs' complaint.

13. Denies the allegations contained in paragraph 13 of plaintiffs' complaint.

[fol. 54] 14. Denies the allegations contained in paragraph 14 of plaintiffs' complaint.

WHEREFORE, defendant demands that judgment be entered dismissing plaintiffs' complaint and granting to defendant costs.

/s/ R. Tieken  
ROBERT TIEKEN  
United States Attorney

/s/ Donald S. Lowitz  
DONALD S. LOWITZ  
Assistant United States Attorney

[fol. 55]

[AFFIDAVIT OF MAILING (Omitted in Printing)]

[fols. 56-65] \* \* \*

[fol. 66]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

[File Endorsement Omitted]

[Title Omitted]

STIPULATION—Filed May 6, 1960

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true for the purpose of this proceeding, provided, however, that this stipulation shall be without prejudice to the right of the parties hereto to object to the relevancy or materiality of any fact herein stated.

1. This action is for refund of the federal estate tax paid to defendant by plaintiffs, CHARLES E. O'MALLEY, CLAUDE C. ALEXANDER and PETER G. FARROW as executors of the will of Edward H. Fabrice, deceased, and this action arises under the Internal Revenue Code of 1939 (former 26 U.S.C., Sec. 1, et seq). Plaintiffs are residents of the Northern District of Illinois and this court has jurisdiction of this action under 28 U.S.C., Sec. 1346.

[fol. 67] 2. Edward H. Fabrice (herein referred to as "Fabrice") died a resident of Chicago, Cook County, Illinois, on October 13, 1949. Prior to his death Fabrice had created five trusts, naming himself, Peter G. Farrow, and Mary L. Schick as co-trustees of each. Paragraph (d) of Article II of each trust agreement provides that the trust may not be revoked by the settlor. Two of the five trusts were created on December 21, 1936—one (herein referred to as "Janet Fabrice Trust No. 1") for the benefit of Fabrice's daughter Janet, and the other (herein referred to as "Lorraine Fabrice Trust No. 1") for the benefit of his daughter Lorraine. The remaining three trusts were

created on January 20, 1937—one (herein referred to as “Janet Fabrice Trust No. 2”) for the benefit of Fabrice’s daughter Janet, another (herein referred to as “Lorraine Fabrice Trust No. 2”) for the benefit of his daughter Lorraine, and the last (herein referred to as “Martha G. Fabrice Trust”) for the benefit of his wife Martha. True and correct copies of each of the five trust agreements are attached hereto as Exhibits “A” through “E” and paragraphs 7 through 11 hereof give the financial details concerning each such trust.

3. During his lifetime, Fabrice leased from his daughter Janet, two Wisconsin farms which were beneficially owned by her. Fabrice also leased from his daughter Lorraine, one Wisconsin farm which was beneficially owned by her. The leases for these three farms were not in [fol. 68] writing. Fabrice, as a tenant, erected certain buildings and other improvements on such farms and took deductions on his federal income tax return for depreciation on the buildings and other improvements which he erected. Rent was paid by Fabrice for those farms. The recipient of that rental income reported it on federal income tax returns and took deductions on those returns for depreciation on permanent improvements which had been located on the farms at the time that she acquired the farms. Fabrice was a tenant of the farms and continued to occupy them and to use the improvements thereon until the date of his death.

4. After the death of Fabrice, plaintiffs were duly qualified on November 3, 1949, by the Probate Court of Cook County, Illinois, as executors of Fabrice’s will and entered upon their duties as such. On February 12, 1951, plaintiffs filed for the estate of Fabrice a federal estate tax return, properly executed, showing no federal estate tax due. On June 30, 1954, the Commissioner of Internal Revenue determined that the estate tax liability of the estate of Fabrice was \$80,726.36, and assessed a deficiency in estate tax of that amount. The major items added to Fabrice’s gross estate by the Commissioner were as follows (the Fabart Company stock referred to had a value of \$200.00 per share at the time of the creation of each of the trusts and at the time of Fabrice’s death):

(a) *Janet Fabrice Trust No. 1*

75 shares of Fabart Company stock given to the trust by Fabrice		
112 shares of Fabart Company stock purchased by the trust		
<hr/>		
187 shares at \$200 each.....	\$37,400.00	
Cash .....	805.29	\$38,205.29
	<hr/>	

[fol. 69]

(b) *Lorraine Fabrice Trust No. 1*

75 shares of Fabart Company stock given to the trust by Fabrice		
112 shares of Fabart Company stock purchased by the trust		
<hr/>		
187 shares at \$200 each.....	\$37,400.00	
Cash .....	7,615.95	\$45,015.95
	<hr/>	

(c) *Janet Fabrice Trust No. 2*

101 shares of Fabart Company stock given to the trust by Fabrice		
152 shares of Fabart Company stock purchased by the trust		
<hr/>		
253 shares at \$200 each.....	\$50,600.00	
Cash .....	12,987.72	\$63,587.72
	<hr/>	

(d) *Lorraine Fabrice Trust No. 2*

101 shares of Fabart Company stock given to the trust by Fabrice		
152 shares of Fabart Company stock purchased by the trust		
<hr/>		
253 shares at \$200 each.....	\$50,600.00	
Cash .....	12,597.35	\$63,197.35
	<hr/>	

(e) *Martha G. Fabrice Trust*

101 shares of Fabart Company  
stock given to the trust by  
Fabrice

152 shares of Fabart Company  
stock purchased by the trust

253 shares at \$200 each.....	\$50,600.00	
Cash .....	16,134.85	\$66,734.85

(f) Farm Improvements .....		37,000.00
		<u>\$313,741.16</u>

On August 6, 1954, plaintiffs paid to the Director of Internal Revenue in Chicago, Illinois, the amount of the claimed deficiency in federal estate tax, together with interest of \$16,774.49, for a total of \$97,500.85.

5. On August 3, 1956, plaintiffs filed with the District [fol. 70] Director of Internal Revenue in Chicago, Illinois, a properly executed claim for refund of the entire \$97,500.85 paid as federal estate tax, and interest thereon. A true and correct copy of said claim is attached hereto as Exhibit F. Thereafter, plaintiffs filed a brief with the Director in support of their claim.

6. On April 24, 1957, the District Director disallowed the claim of plaintiffs, whereupon on May 23, 1957 plaintiffs filed a properly executed protest, with supporting briefs, again stating their position. A true and correct copy of said protest (except for the statement of facts and brief portions thereof) is attached hereto as Exhibit G. On September 30, 1957, the Office of the Regional Commissioner sent to plaintiffs a notice of formal disallowance of their claim.

7. Upon the creation of the Janet Fabrice Trust No. 1, Fabrice transferred to its seventy-five shares of a closely held Illinois corporation, then known as Fabart Company, and now known as Fabart Instrument Company. No other property was ever transferred by Fabrice to that trust. Income earned by that trust from its creation through October 13, 1949, was as follows:

	<u>Dividends Received</u>	<u>Interest Received On Bonds Purchased by The Trustees from Income</u>
1937	\$ 6,150.00	
1938		\$ 322.87
1939	3,000.00	107.63
1940	5,250.00	
1941	5,880.00	
1942	7,480.00	22.50
1945	2,805.00	208.68
1946	5,610.00	208.68
1947		208.68
1948		208.68
1949	2,805.00	
	<hr/>	<hr/>
	\$38,980.00	\$1,287.72

TOTAL INCOME.....\$40,267.72

[fol. 71] With a portion of that income, the following additional shares of Fabart Company were purchased by the Trustees at \$100.00 per share:

On February 8, 1939—30 shares  
On February 9, 1940—42 shares  
On March 6, 1941 —40 shares

The total price paid for these 112 shares was \$11,-200.00. Other distributions by the trust were as follows:

	<u>Distribution to Beneficiary:</u>	
1940	\$5,250.00	
1941	1,260.98	
1944	7,000.00	
1945	3,013.68	
1946	5,718.68	
1947	208.68	
1948	208.68	
1949	2,805.00	\$25,465.70
	<hr/>	

Income Taxes Paid:

1938	\$333.50	
1939	8.91	
1940	120.31	
1942	561.94	
1943	1,772.07	2,796.73
	<hr/>	

Total Disbursements:

Taxes	2,796.73	
Distributions to beneficiary	25,465.70	
Fabart stock purchases	11,200.00	<u>\$39,462.43</u>

The total income of the Janet Fabrice Trust No. 1 of \$40,-267.73, less \$39,462.43 in disbursements, left cash on hand as of October 13, 1949, of \$805.29.

8. Upon the creation of the Lorraine Fabrice Trust No. 1, Fabrice transferred to it seventy-five shares of Fabart Company. No other property was ever transferred by [fol. 72] Fabrice to that trust. Income earned by that trust from its creation through October 13, 1949, was as follows:

	<u>Dividends Received</u>	<u>Interest Received on Bonds Purchased by the Trustees from Income</u>	
1937	\$ 6,150.00		
1939	3,000.00		
1940	5,250.00		
1941	5,880.00		
1942	7,480.00	\$22.50	
1945	2,805.00		
1946	5,610.00		
1949	2,805.00		
	<u>\$38,980.00</u>	<u>\$22.50</u>	<u>\$39,002.50</u>
			Total Income

With a portion of that income, the following additional shares of Fabart Company were purchased by Trustees at \$100.00 per share:

On February 8, 1939—30 shares  
On February 9, 1940—42 shares  
On March 6, 1941 —40 shares

The total price paid for these 112 shares was \$11,-200.00. Other distributions by the trust were as follows:



Distribution to Beneficiary:

1939	\$6,150.00	
1945	2,805.00	
1946	5,510.00	
1949	2,805.00	\$17,270.00

Income Taxes Paid:

1940	116.00	
1941	277.20	
1942	762.60	
1943	1,760.75	2,916.55

Total Disbursements:

Taxes	2,916.55	
Distributions to beneficiary	17,270.00	
Fabart stock purchases	11,200.00	\$31,386.55

[fol. 73] The total income of the Lorraine Fabrice Trust No. 1 of \$39,002.50, less \$31,386.55 in disbursements, left cash on hand as of October 13, 1949, of \$7,615.95.

9. Upon the creation of the Janet Fabrice Trust No. 2, Fabrice transferred to it 101 shares of Fabart Company. No other property was ever transferred by Fabrice to that trust. Income earned by that trust from its creation through October 13, 1949, was as follows:

	<u>Dividends Received</u>	<u>Interest Received on Bonds Purchased by the Trustees from Income</u>	
1937	\$ 8,282.00		
1938		\$434.85	
1939	4,040.00	144.89	
1940	7,050.00		
1941	7,880.00		
1942	10,120.00		
1943		252.00	
1945	3,795.00	77.23	
1946	7,590.00	32.83	
1947		15.12	
1948		15.12	
1949	3,795.00		
	<u>\$52,552.00</u>	<u>\$972.04</u>	\$53,524.04

With a portion of that income, the following additional shares of Fabart Company were purchased by the Trustees at \$100.00 per share:

On March 7, 1939 —40 shares  
 On February 9, 1940—56 shares  
 On March 6, 1941 —56 shares

The total price paid for these 152 shares was \$15-200.00. Other distributions by the trust were as follows:

[fol. 74]

Distribution to Beneficiary:

1940	\$ 7,050.00	
1941	1,717.45	
1942	4,031.69	
1943	252.00	
1945	3,872.23	
1947	15.12	
1948	15.12	
1949	3,795.00	\$20,748.61

Income Taxes Paid:

1938	528.20	
1939	13.39	
1940	166.80	
1942	813.07	
1943	1,340.24	
1947	1,726.01	4,587.71

Total Disbursements:

Distribution to beneficiary	\$20,748.61	
Taxes	4,587.71	
Fabart Stock Purchases	15,200.00	\$40,536.32

The total income of the Janet Fabrice Trust No. 2 of \$53,-524.04, less \$40,536.32 in disbursements, left on hand as of October 13, 1949, cash of \$12,987.72.

10. Upon the creation of the Lorraine Fabrice Trust No. 2, Fabrice transferred to it 101 shares of Fabart Company. No other property was ever transferred by Fabrice to that trust. Income earned by that trust from its creation through October 13, 1949, was as follows:

	<u>Dividends Received</u>	<u>Interest Received on Bonds Purchased by the Trustees from Income</u>
1937	\$8,282.00	
1939	4,040.00	
1940	7,050.00	
1941	7,880.00	
1942	10,120.00	\$382.50
1943		252.00
1945	3,795.00	
1946	7,590.00	
1949	3,795.00	
	<hr/> \$52,552.00	<hr/> \$634.50

Total Income.....\$53,186.50

[fol. 75] With a portion of that income, the following additional shares of Fabart Company were purchased by the Trustees at \$100.00 per share:

On March 7, 1939 —40 shares  
On February 9, 1940—56 shares  
On March 6, 1941 —56 shares

The total price paid for those 152 shares was \$15,200.00. Other distributions by the trust were as follows:

Distribution to Beneficiary:

1937	8,282.00	
1942	4,366.00	
1943	252.00	
1945	3,795.00	
1949	3,795.00	\$20,490.00

Income Taxes Paid:

1940	157.60	
1941	456.50	
1942	762.60	
1943	1,350.95	
1944	454.85	
1947	1,716.65	4,899.15

Total Disbursements:

Distribution to beneficiary	20,490.00	
Taxes	4,899.15	
Fabart Stock Purchases	15,200.00	\$40,589.15

The total income of the Lorraine Fabrice Trust No. 2 of \$53,186.50 less \$40,589.15 in disbursements, left cash on hand as of October 13, 1949, of \$12,597.35.

11. Upon the creation of the Martha G. Fabrice Trust, Fabrice transferred to it 101 shares of Fabart Company. No other property was ever transferred by Fabrice to that trust. Income earned by that trust from its creation through October 13, 1949, was as follows:

[fol. 76]

	<u>Dividends</u>	
1937	\$8,282.00	
1939	4,040.00	
1940	7,050.00	
1941	7,880.00	
1942	10,120.00	
1945	3,795.00	
1946	7,590.00	
1949	3,795.00	
		<hr/>
		\$52,552.00

With a portion of that income, the following additional shares of Fabart Company were purchased by the Trustees at \$100.00 per share:

On March 7, 1939 —40 shares  
 On February 9, 1940—56 shares  
 On March 6, 1941 —56 shares

The total price paid for those 152 shares was \$15,200.00. Other distributions by the trust were as follows:

Distribution to Beneficiary:

1937	\$8,282.00	
1941	2,000.00	
1942	2,000.00	
1945	3,795.00	
		<hr/>
		\$16,077.00

Income Taxes Paid:

1939	157.60	
1940	456.50	
1942	762.60	
1943	1,946.80	
1947	1,716.65	
Legal 1947	100.00	
		<hr/>
		5,140.15

Total Disbursements:

Distribution to beneficiary	16,077.00	
Taxes	5,140.15	
Fabart Stock Purchases	15,200.00	<u>\$36,417.15</u>

The total income of the Martha G. Fabrice Trust of \$52,552.00, less \$36,417.15, left cash on hand as of October 13, 1949, of \$16,134.85.

[fol. 77] 12. Plaintiffs have incurred and will incur attorneys' fees in the prosecution of their claim for refund and in the prosecution of this suit for refund of federal estate taxes. The amount of such fees are not at this time determined.

The parties request that, in the event the court should determine any issue herein involved in favor of the plaintiffs, the record in this cause shall remain open for 60 days within which time the parties are to agree to the amount of the judgment to be entered and in the event the parties cannot so agree, the necessary additional evidence relative to the computation of said judgment may be submitted to the court within said 60 day period.

THE UNITED STATES OF AMERICA

By /s/ R. Tieken  
ROBERT E. TIEKEN  
United States Attorney

CHARLES E. O'MALLEY  
CLAUDE C. ALEXANDER  
PETER G. FARROW, as Executors of  
the Will of Edward H. Fabrice,  
Deceased

By /s/ Addis E. Hull

/s/ Leon Fieldman  
Their Attorneys

[fol. 78]

WFC:MH 12/19/36 1&amp;4

## EXHIBIT "A" TO STIPULATION

THIS AGREEMENT made and entered into this 21st day of December, A. D. 1936, by and between EDWARD H. FABRICE of the City of Chicago, County of Cook and State of Illinois, hereinafter termed the "Settlor", and EDWARD H. FABRICE, PETER G. FARROW and MARY L. SCHICK of the City of Chicago, County of Cook and State of Illinois, hereinafter termed the "Trustees", WITNESSETH:

That the Settlor, in consideration of the agreements and undertakings hereinafter made by the Trustees, does hereby sell, assign, transfer and set-over unto the Trustees the following described securities to-wit:

Seventy-five (75) shares of the capital stock of Fab-art Instrument Company, an Illinois Corporation, and the Trustees are hereby authorized to and agree that they will receive and hold the said securities and/or such additional securities, cash and real estate or other property as may be transferred, assigned, conveyed, bequeathed, devised or delivered to the Trustees by the Settlor, or by any person, to become a part of the principal of the Trust Estate, and all investments and reinvestments thereof, hereinafter sometimes called the "Trust Estate", and the income therefrom, for the uses and purposes and upon the terms and conditions hereinafter provided, that is to say:

## ARTICLE I.

This agreement and the trust hereby evidenced shall be known as and designated as: "THE EDWARD H. FABRICE—JANET FABRICE TRUST".

## ARTICLE II.

The Trust Estate shall be distributed both as to income and principal in the following manner:

- (a) The net income from the Trust Estate shall be paid, in whole or in part, to my daughter, JANET FABRICE, in such proportions, amounts and at [fol. 79] such times as the Trustees may, from time to time, in their sole discretion, determine, or said net income may be retained by the Trustees and credited to the account of said beneficiary, and any income not distributed in any calendar year shall become a part of the principal of the Trust Estate.
- (b) The Trustees may, in their sole discretion, instead of paying said income to said beneficiary or applying the same to the account of said beneficiary, use said income for the proper and suitable support and maintenance of said beneficiary and any persons who may be dependent upon her for support in such manner as the Trustees may determine.
- (c) If, because of accident, sickness or other emergency or unusual condition of any kind, the Settlor's said daughter, or any of the daughter's children, shall be in need of funds in addition to the income received by her from all sources within the knowledge of the Trustees, or if the Settlor's said daughter, or any of her children, shall be in need of extra funds for the purpose of providing for the education of the said daughter's children, or any of them, then the Trustees upon the written request of the Settlor's daughter, or any of her children being in need, may withdraw from the principal of the Trust Estate and pay unto the Settlor's said daughter for her own use and benefit, or for that of the daughter's children, or any of them, such sum or sums, at any time and from time to time, as in the absolute opinion of the Trustees shall be reasonably sufficient to relieve their need.
- (d) This trust may not be revoked by the Settlor, but shall terminate upon the happening of any one of the following contingencies:
- (1) At the expiration of twenty-one (21) years from and after the date of this Instrument;
  - (2) Upon the death of the Settlor; or

(3) Upon the death of my daughter, JANET FABRICE;

whichever contingency shall occur first.

- (e) In the event the trust terminates by reason of lapse of time or the death of the Settlor, all property included in the trust shall be distributed to my daughter, JANET FABRICE, if she be then living. In the event the trust shall terminate by reason of the death of my said daughter, JANET FABRICE, then and in that event all property included in the trust shall be distributed in equal shares *per stirpes* and not *per capita* to, between or among, as the case may be, the heirs of the body [fol. 80] of my said daughter, and in the absence of such heirs of the body, to the personal representative of my daughter's estate to be disposed of according to law.

### ARTICLE III.

In the administration and distribution of the Trust Estate hereinabove created, the Trustees and any persons who are or may become beneficiaries under said Article shall be governed and controlled by the following:

- (a) The Trustees may cause the investments which may be delivered to or acquired by them to be registered in their names or in the name of their nominee.
- (b) Any assets now or hereafter transferred to the Trustees or acquired by them as Trustees hereunder, may be held and retained by them in the Trust Estate in their sole discretion, whether or not the same conform to the laws applicable to the investment of trust funds.
- (c) The Trustees, insofar as possible, shall invest and reinvest all funds from time to time available for investment or reinvestment in stocks, bonds, negotiable instruments and other securities and investments as the Trustees, in their discretion, shall deem proper and for the best interests of the Trust Estate without being restricted by any present or



future laws governing the investment of trust funds. The Trustees, for any consideration or purpose which they shall deem proper, may sell, exchange, alter, mortgage or pledge the investments of the Trust Estate, or any of them, may join in by deposit, pledge or otherwise any plan of reorganization or readjustment of any corporation, or use any other means of protecting or dealing with any investment of the Trust Estate, and in general may exercise each and every other power or right with respect to the ownership of each investment of the Trust Estate as individuals generally have and enjoy with respect to their own investments and securities including the power to issue any and all proxies, to vote stock and to deposit securities with any bondholder's protective committee. In the investment or disposition of any property in said trust, the Trustees are permitted to deal with any one of the Trustees individually, being restricted in such dealing only to the fair market value of the property involved. The Trustees shall have full power of collection, satisfaction, enforcement, extension, settlement, composition, compromise, assignment, transfer and conveyance of and over any and all the assets from time to time subsisting in the Trust Estate. They may in their discretion and at their risk transfer to and carry [fol. 81] in their individual names, or in the name of a nominee, any assets of the Trust Estate.

- (d) No purchaser at any sale by the Trustees hereunder, nor any person dealing with them, shall be privileged or required to inquire into any act of the Trustees hereunder, nor obliged to see to the application of any money or property paid or delivered to the Trustees.
- (e) The Trustees are hereby vested with full right, power and authority to determine the manner in which expenses are to be borne and the manner in which receipts are to be credited as between principal and income, and also to determine what shall be "income" and "net income". The Trustees are

authorized, in their sole discretion, to charge all premiums on investments forthwith against principal and to credit all discounts thereon to principal instead of against or to income.

- (f) All payments of income and/or distributions of principal as and when such payments or distributions become due shall be made to the beneficiary in person, or upon her personal receipt, and shall not be grantable, transferable or otherwise assignable in anticipation of payment thereof, in whole or in part, by the voluntary or involuntary acts of such beneficiary or by operation of law and shall not be liable or taken for any obligation of the beneficiary, including alimony. Distributions of the Trust Estate may be made in investments and/or cash and in such proportions thereof as the Trustees shall determine to be most equitable.
- (g) The Trustees shall pay all costs, charges and expenses of the management of the Trust Estate and all taxes assessed on or against the Trust Estate or the Trustees on account of the Trust Estate, together with reasonable compensation to the Trustees for their services hereunder. All income taxes which may be assessed on or against the Trust Estate or the Trustees on account of the Trust Estate by reason of any profit derived from the sale of securities or by reason of stock dividends declared on any shares of stock constituting a part of the Trust Estate shall be paid therefrom.
- (h) If, at any time, any investment of the Trust Estate shall consist of real estate, then in addition to the powers hereinbefore conferred upon the Trustees, the Trustees may, for any consideration or purpose which they shall deem proper, lease such real estate for any term of years, although such term of years shall extend beyond the period of this [fol. 82] trust, and may make alterations or repairs on, additions to and erect or raze improvements on such real estate. They may also pay out of the Trust Estate all taxes and special assessments lev-

ied or imposed upon or against any such real estate, and also the necessary and usual charges and expenses in connection with the management, operation and control and sale thereof. Real Estate may be sold in the Trustees' discretion on any terms deemed suitable and sales may be made partly for cash and the balance on credit.

- (i) In each case where discretionary power is vested in the Trustees hereunder, their exercise thereof shall be final and conclusive and binding upon all persons having any rights under this Trust Agreement.

The powers enumerated above are not intended and shall not be construed in any respect as in limitation of any authority given or conferred upon the Trustees by law, but are intended and shall be construed as in addition thereto.

The Trustees may, in any case, act without the giving of any bond or other security for the faithful performance of their duties, and shall be personally liable only in the event of bad faith in the performance of their duties.

In the event of the death of either or both of the Trustees, PETER G. FARROW or MARY L. SCHICK, or in the event of the resignation, removal or refusal to act of any one or more of the Trustees, then and in either of those events the remaining Trustee or Trustees shall continue the administration of the Trust Estate, shall be vested with title to all of the property included in the Trust Estate, and shall have and exercise all of the rights, privileges and powers, whether discretionary or otherwise, which are by this Instrument vested in the original Trustees.

IN WITNESS WHEREOF the Settlor has hereunto set his hand and seal, and said EDWARD H. FABRICE, PETER G. FARROW and MARY L. SCHICK, the Trustees, have hereunto set their hands and seals to evidence their acceptance of the trusts hereby imposed.

This Trust Agreement is executed in triplicate.

..... (SEAL)

Settlor

..... (SEAL)

Trustee

..... (SEAL)

Trustee

..... (SEAL)

Trustee

[fols. 84-89] \* \* \*

[fol. 90]

WFC:MH 1/8/37 1&4

### EXHIBIT "C" TO STIPULATION

THIS INDENTURE OF TRUST, made and executed this 20th day of January, A. D. 1937, by EDWARD H. FABRICE of the City of Chicago, County of Cook and State of Illinois, hereinafter sometimes called the "Settlor", WITNESSETH:

That the Settlor, in consideration of the agreements and undertakings hereinafter made by the Trustees, does hereby sell, assign, transfer and set-over unto the Trustees the following described securities to-wit:

One hundred one (101) shares of the capital stock of Fabart Instrument Company, an Illinois Corporation, and the Trustees are hereby authorized to and agree that they will receive and hold the said securities and/or such additional securities, cash and real estate or other property as may be transferred, assigned, conveyed, bequeathed, devised or delivered to the Trustees by the Settlor, or by any person, to become a part of the principal of the Trust Estate, and all investments and reinvestments thereof, hereinafter sometimes called the "Trust Estate", and the income therefrom, for the uses and purposes and upon the terms and conditions hereinafter provided, that is to say:

### ARTICLE I.

This agreement and the trust hereby evidenced shall be known as and designated as: "THE EDWARD H. FABRICE—JANET FABRICE TRUST #2".

### ARTICLE II.

The Trust Estate shall be distributed both as to income and principal in the following manner:

[fol. 91] (a) The net income from the Trust Estate shall be paid, in whole or in part, to my daughter, JANET FABRICE, in such proportions, amounts and at such times as the Trustees may, from time

to time, in their sole discretion, determine, or said net income may be retained by the Trustees and credited to the account of said beneficiary, and any income not distributed in any calendar year shall become a part of the principal of the Trust Estate.

- (b) The Trustees may, in their sole discretion, instead of paying said income to said beneficiary or applying the same to the account of said beneficiary, use said income for the proper and suitable support and maintenance of said beneficiary and any persons who may be dependent upon her for support in such manner as Trustees may determine.
- (c) If, because of accident, sickness or other emergency or unusual condition of any kind, the Settlor's said daughter, or any of the daughter's children, shall be in need of funds in addition to the income received by her from all sources within the knowledge of the Trustees, or if the Settlor's said daughter, or any of her children, shall be in need of extra funds for the purpose of providing for the education of the said daughter's children, or any of them, then the Trustees upon the written request of the Settlor's daughter, or any of her children being in need, may withdraw from the principal of the Trust Estate and pay unto the Settlor's said daughter for her own use and benefit, or for that of the daughter's children, or any of them, such sum or sums, at any time and from time to time, as in the absolute opinion of the Trustees shall be reasonably sufficient to relieve their need.
- (d) This Trust may not be revoked or altered by the Settlor, but shall terminate upon the happening of any one of the following contingencies:

- (1) At the expiration of twenty-five (25) years from and after the date of this Instrument;

or

- (2) At the expiration of twenty-one (21) years from and after the death of my said daughter, JANET FABRICE;

whichever contingency shall occur first.

- (e) In the event the Trust terminates by reason of lapse of time as provided in Article II, (d), (1) above, all property included in the Trust Estate shall be immediately distributed to my daughter, JANET FABRICE, if she be then living, and if [fol. 92] not then living to her then living descendants per stirpes and not per capita, and in the absence of such descendants to the then living descendants of the Settlor per stirpes and not per capita. In the event the Trust shall terminate by reason of lapse of time, as provided in Article II, (d), (2) above, all property included in the Trust shall be immediately distributed to the then living descendants of my said daughter, JANET FABRICE, per stirpes and not per capita, and in the absence of such descendants to the then living descendants of the Settlor per stirpes and not per capita.
- (f) In the event of the death of my said daughter, JANET FABRICE, prior to the time herein fixed for distribution of the principal of the Trust Estate, the Trustees shall pay the income therefrom to, or use the same in whatsoever manner they deem advisable for the benefit of, the descendants of said daughter, and if none then the descendants of the Settlor. Such income shall be paid to or used for the benefit of such descendants per stirpes and not per capita.

### ARTICLE III.

In the administration and distribution of the Trust Estate hereinabove created, the Trustees and any persons who are or may become beneficiaries under said Article shall be governed and controlled by the following:

- (a) The Trustees may cause the investments which may be delivered to or acquired by them to be registered in their names or in the name of their nominee.
- (b) Any assets now or hereafter transferred to the Trustees or acquired by them as Trustees hereunder, may be held and retained by them in the Trust

Estate in their sole discretion, whether or not the same conform to the laws applicable to the investment of trust funds.

- (c) The Trustee, insofar as possible, shall invest and reinvest all funds from time to time available for investment or reinvestment in stocks, bonds, negotiable instruments and other securities and investments as the Trustees, in their discretion, shall deem proper and for the best interests of the Trust Estate without being restricted by any present or future laws governing the investment of trust funds. The Trustees, for any consideration or purpose which they shall deem proper, may sell, exchange, alter, mortgage or pledge the investments of the Trust Estate, or any of them, may join in by [fol. 93] deposit, pledge or otherwise any plan of reorganization or readjustment of any corporation, or use any other means of protecting or dealing with any investment of the Trust Estate, and in general may exercise each and every other power or right with respect to the ownership of each investment of the Trust Estate as individuals generally have and enjoy with respect to their own investments and securities including the power to issue any and all proxies, to vote stock and to deposit securities with any bondholder's protective committee. In the investment or disposition of any property in said trust, the Trustees are permitted to deal with any one of the Trustees individually, being restricted in such dealing only to the fair market value of the property involved. The Trustees shall have full power of collection, satisfaction, enforcement, extension, settlement, composition, compromise, assignment, transfer and conveyance of and over any and all the assets from time to time subsisting in the Trust Estate. They may in their discretion and at their risk transfer to and carry in their individual names, or in the name of a nominee, any assets of the Trust Estate.
- (d) No purchaser at any sale by the Trustees hereunder, nor any person dealing with them shall be



privileged or required to inquire into any act of the Trustees hereunder, nor obliged to see to the application of any money or property paid or delivered to the Trustees.

- (e) The Trustees are hereby vested with full right, power and authority to determine the manner in which expenses are to be borne and the manner in which receipts are to be credited as between principal and income, and also to determine what shall be "income" and "net income". The Trustees are authorized, in their sole discretion, to charge all premiums on investments forthwith against principal and to credit all discounts thereon to principal instead of against or to income.
  - (f) All payments of income and/or distributions of principal as and when such payments or distributions become due shall be made to the beneficiary in person, or upon her personal receipt, and shall not be grantable, transferable or otherwise assignable in anticipation of payment thereof, in whole or in part, by the voluntary or involuntary acts of such beneficiary or by operation of law and shall not be liable or taken for any obligation of the beneficiary, including alimony. Distributions of the Trust Estate may be made in investments and/or cash and in such proportions thereof as the Trustees shall determine to be most equitable.
- [fol. 94] (g) The Trustees shall pay all costs, charges and expenses of the management of the Trust Estate and all taxes assessed on or against the Trust Estate or the Trustees on account of the Trust Estate, together with reasonable compensation to the Trustees for their services hereunder. All income taxes which may be assessed on or against the Trust Estate or the Trustees on account of the Trust Estate by reason of any profit derived from the sale of securities or by reason of stock dividends declared on any shares of stock constituting a part of the Trust Estate shall be paid therefrom.
- (h) If, at any time, any investment of the Trust Estate shall consist of real estate, then in addition to

the powers hereinbefore conferred upon the Trustees, the Trustees may, for any consideration or purpose which they shall deem proper, lease such real estate for any term of years, although such term of years shall extend beyond the period of this trust, and may make alterations or repairs on, additions to and erect or raze improvements on such real estate. They may also pay out of the Trust Estate all taxes and special assessments levied or imposed upon or against any such real estate, and also the necessary and usual charges and expenses in connection with the management, operation and control and sale thereof. Real Estate may be sold in the Trustees' discretion on any terms deemed suitable and sales may be made partly for cash and the balance on credit.

- (i) In each case where discretionary power is vested in the Trustees hereunder, their exercise thereof shall be final and conclusive and binding upon all persons having any rights under this Trust Agreement.

The powers enumerated above are not intended and shall not be construed in any respect as in limitation of any authority given or conferred upon the Trustees by law, but are intended and shall be construed as in addition thereto.

All of the foregoing powers of the Trustees are subject to the express limitation that, so long as the Settlor lives and remains competent, the Trustees shall not sell or otherwise dispose of any assets of the Trust Estate except upon his written direction to that effect, and the Settlor, for himself and for all the beneficiaries hereunder, hereby expressly releases and exonerates the Trustees of and from any and all liability on account of or arising out of the retention of any assets of the Trust Estate.

[fol. 95] The Trustees may, in any case, act without the giving of any bond or other security for the faithful performance of their duties, and shall be personally liable only in the event of bad faith in the performance of their duties.

In the event of the death, resignation, removal or refusal to act of any one or more of the Trustees, then and in either of those events the remaining Trustee or Trustees shall continue the administration of the Trust Estate, shall be vested with title to all of the property included in the Trust Estate, and shall have and exercise all of the rights, privileges and powers, whether discretionary or otherwise, which are by this Instrument vested in the original Trustees.

IN WITNESS WHEREOF the Settlor has hereunto set his hand and seal, and said EDWARD H. FABRICE, PETER G. FARROW and MARY L. SCHICK, the Trustees, have hereunto set their hands and seals to evidence their acceptance of the trusts hereby imposed.

This Trust Agreement is executed in triplicate.

..... (SEAL)

Settlor

..... (SEAL)

Trustee

..... (SEAL)

Trustee

..... (SEAL)

Trustee

[fol. 102]

WFC:MH 1/8/37 1&4

#### EXHIBIT E TO STIPULATION

THIS INDENTURE OF TRUST, made and executed this 20th day of January, A. D. 1937, by EDWARD H. FABRICE of the City of Chicago, County of Cook and State of Illinois, hereinafter sometimes called the "Settlor", WITNESSETH:

That the Settlor, in consideration of the agreements and undertakings hereinafter made by the Trustees, does hereby sell, assign, transfer and set-over unto the Trustees the following described securities to-wit:

One hundred one (101) shares of the capital stock of Fabart Instrument Company, an Illinois Corporation, and the Trustees are hereby authorized to and agree that they will receive and hold the said securities and/or such additional securities, cash and real estate or other property as may be transferred, assigned, conveyed, bequeathed, devised or delivered to the Trustees by the Settlor, or by any person, to become a part of the principal of the Trust Estate, and all investments and reinvestments thereof, hereinafter sometimes called the "Trust Estate", and the income therefrom, for the uses and purposes and upon the terms and conditions hereinafter provided, that is to say:

#### ARTICLE I.

This agreement and the trust hereby evidenced shall be known as and designated as: "THE EDWARD H. FABRICE—MARTHA G. FABRICE TRUST".

#### ARTICLE II.

The Trust Estate shall be distributed both as to income and principal in the following manner:

[fol. 103] (a) The net income from the Trust Estate shall be paid, in whole or in part, to my wife,

MARTHA G. FABRICE, in such proportions, amounts and at such times as the Trustees may, from time to time, in their sole discretion, determine, or said net income may be retained by the Trustees and credited to the account of said beneficiary, and any income not distributed in any calendar year shall become a part of the principal of the Trust Estate.

- (b) The Trustees may, in their sole discretion, instead of paying said income to said beneficiary or applying the same to the account of said beneficiary, use said income for the proper and suitable support and maintenance of said beneficiary and any persons who may be dependent upon her for support in such manner as the Trustees may determine.
- (c) If, because of accident, sickness or other emergency or unusual condition of any kind, the Settlor's said wife shall be in need of funds in addition to the income received by her from all sources within the knowledge of the Trustees, then the Trustees, upon the written request of the Settlor's wife, may withdraw from the principal of the Trust Estate and pay unto the Settlor's said wife for her own use and benefit, such sum or sums, at any time and from time to time, as in the absolute opinion of the Trustees shall be reasonably sufficient to relieve her need.
- (d) This Trust may not be revoked or altered by the Settlor, but shall terminate upon the happening of any one of the following contingencies:

- (1) At the expiration of twenty-five (25) years from and after the date of this Instrument;

or

- (2) At the expiration of twenty-one (21) years from and after the death of my said wife, MARTHA G. FABRICE;

whichever contingency shall occur first.

- (e) In the event the Trust terminates by reason of lapse of time as provided in Article II, (d), (1)

above, all property included in the Trust Estate shall be immediately distributed to my wife, MARTHA G. FABRICE, if she be then living, and if not then living to her then living descendants per stirpes and not per capita, and in the absence of such descendants then to the personal representatives of her estate to be disposed of according to law. In the event the Trust shall terminate by reason of lapse of time, as provided in Article II, [fol. 104] (d), (2) above, all property included in the Trust shall be immediately distributed to the then living descendants of my said wife, MARTHA G. FABRICE, per stirpes and not per capita, and in the absence of such descendants then to the personal representatives of her estate to be disposed of according to law.

- (f) In the event of the death of my said wife, MARTHA G. FABRICE, prior to the time herein fixed for distribution of the principal of the Trust Estate, the Trustees shall pay the income therefrom to, or use the same in whatsoever manner they deem advisable for the benefit of, the descendants of my said wife, per stirpes and not per capita, and if none, then the same shall be paid to the personal representatives of her estate to be disposed of according to law.

### ARTICLE III.

In the administration and distribution of the Trust Estate hereinabove created, the Trustees and any persons who are or may become beneficiaries under said Article shall be governed and controlled by the following:

- (a) The Trustees may cause the investments which may be delivered to or acquired by them to be registered in their names or in the name of their nominee.
- (b) Any assets now or hereafter transferred to the Trustees or acquired by them as Trustees hereunder, may be held and retained by them in the Trust Estate in their sole discretion, whether or not the

same conform to the laws applicable to the investment of trust funds.

- (c) The Trustees, insofar as possible, shall invest and reinvest all funds from time to time available for investment or reinvestment in stocks, bonds, negotiable instruments and other securities and investments as the Trustees, in their discretion, shall deem proper and for the best interests of the Trust Estate without being restricted by any present or future laws governing the investment of trust funds. The Trustees, for any consideration or purpose which they shall deem proper, may sell, exchange, alter, mortgage or pledge the investments of the Trust Estate, or any of them, may join in by deposit, pledge or otherwise any plan of reorganization or readjustment of any corporation, or use any other means of protecting or dealing with any investment of the Trust Estate, and in general may exercise each and every other power or right with respect to the ownership of each investment of the Trust Estate as individuals generally have and enjoy with respect to their own investments and securities including the power to issue any and all proxies, to vote stock and to deposit securities with any bondholder's protective committee. In the investment or disposition of any property in said trust, the Trustees are permitted to deal with any one of the Trustees individually, being restricted in such dealing only to the fair market value of the property involved. The Trustees shall have full power of collection, satisfaction, enforcement, extension, settlement, composition, compromise, assignment, transfer and conveyance of and over any and all the assets from time to time subsisting in the Trust Estate. They may in their discretion and at their risk transfer to and carry in their individual names, or in the name of a nominee, any assets of the Trust Estate.
- (d) No purchaser at any sale by the Trustees hereunder, nor any person dealing with them shall be privileged or required to inquire into any act of the



Trustees hereunder, nor obliged to see to the application of any money or property paid or delivered to the Trustees.

- (e) The Trustees are hereby vested with full right, power and authority to determine the manner in which expenses are to be borne and the manner in which receipts are to be credited as between principal and income, and also to determine what shall be "income" and "net income". The Trustees are authorized, in their sole discretion, to charge all premiums on investments forthwith against principal and to credit all discounts thereon to principal instead of against or to income.
- (f) All payments of income and/or distributions of principal as and when such payments or distributions become due shall be made to the beneficiary in person, or upon her personal receipt, and shall not be grantable, transferable or otherwise assignable in anticipation of payment thereof, in whole or in part, by the voluntary or involuntary acts of such beneficiary or by operation of law and shall not be liable or taken for any obligation of the beneficiary, including alimony. Distributions of the Trust Estate may be made in investments and/or cash and in such proportions thereof as the Trustees shall determine to be most equitable.
- (g) The Trustees shall pay all costs, charges and expenses of the management of the Trust Estate and all taxes assessed on or against the Trust Estate or the Trustees on account of the Trust Estate, together with reasonable compensation to the Trustees for their services hereunder. All income [fol. 106] taxes which may be assessed on or against the Trust Estate or the Trustees on account of the Trust Estate by reason of any profit derived from the sale of securities or by reason of stock dividends declared on any shares of stock constituting a part of the Trust Estate shall be paid therefrom.
- (h) If, at any time, any investment of the Trust Estate shall consist of real estate, then in addition to the powers hereinbefore conferred upon the Trus-



tees, the Trustees may, for any consideration or purpose which they shall deem proper, lease such real estate for any term of years, although such term of years shall extend beyond the period of this trust, and may make alterations or repairs on, additions to and erect or raze improvements on such real estate. They may also pay out of the Trust Estate all taxes and special assessments levied or imposed upon or against any such real estate, and also the necessary and usual charges and expenses in connection with the management, operation and control and sale thereof. Real Estate may be sold in the Trustees' discretion on any term deemed suitable and sales may be made partly for cash and the balance on credit.

- (i) In each case where discretionary power is vested in the Trustees hereunder, their exercise thereof shall be final and conclusive and binding upon all persons having any rights under this Trust Agreement.

The powers enumerated above are not intended and shall not be construed in any respect as in limitation of any authority given or conferred upon the Trustees by law, but are intended and shall be construed as in addition thereto.

All of the foregoing powers of the Trustees are subject to the express limitation that, so long as the Settlor lives and remains competent, the Trustees shall not sell or otherwise dispose of any assets of the Trust Estate except upon his written direction to that effect, and the Settlor, for himself and for all the beneficiaries hereunder, hereby expressly releases and exonerates the Trustees of and from any and all liability on account of or arising out of retention of any assets of the Trust Estate.

[fol. 107] The Trustees may, in any case, act without the giving of any bond or other security for the faithful performance of their duties, and shall be personally liable only in the event of bad faith in the performance of their duties.

In the event of the death, resignation, removal or refusal to act of any one or more of the Trustees, then and in either of those events the remaining Trustee or Trustees shall continue the administration of the Trust Estate, shall be vested with title to all of the property included in the Trust Estate, and shall have and exercise all of the rights, privileges and powers, whether discretionary or otherwise or otherwise, which are by this Instrument vested in the original Trustees.

IN WITNESS WHEREOF the Settlor has hereunto set his hand and seal, and said EDWARD H. FABRICE, PETER G. FARROW and MARY L. SCHICK, the Trustees, have hereunto set their hands and seals to evidence their acceptance of the trusts hereby imposed.

This Trust Agreement is executed in triplicate.

..... (SEAL)  
Settlor

..... (SEAL)  
Trustee

..... (SEAL)  
Trustee

..... (SEAL)  
Trustee

[fols. 108-200]   \* \* \*

[fol. 201]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

No. 58 C 76

CHARLES E. O'MALLEY, CLAUDE C. ALEXANDER and PETER  
G. FARROW, as Executors of the Will of Edward H.  
Fabrice, Deceased, PLAINTIFFS

*vs.*

THE UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM, FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER—August 2, 1963

Edward H. Fabrice (hereinafter referred to as "Fabrice") died a resident of Illinois on October 13, 1949. Prior to his death Fabrice had created five irrevocable trusts naming himself and two other persons as co-trustees. The trust instruments were identical except for the names of the beneficiaries and the property transferred. Fabrice's daughter Janet was the beneficiary of two of the trusts, his daughter Lorraine was beneficiary of two others and his wife was to receive the benefit from the fifth trust.

During his lifetime Fabrice orally leased, occupied and paid rent to his daughters for three Wisconsin farms beneficially owned by them. The daughters owned the farms by virtue of conveyances made to them by Fabrice. As a tenant Fabrice erected certain buildings and other improvements on the farms, for which he took depreciation deductions on his federal income tax returns.

After the death of Fabrice and the filing of his federal estate tax return, the Commissioner of Internal Revenue determined his estate tax liability should have been \$80,726.36. The estate tax return having showed no such tax [fol. 202] due, a deficiency of \$80,726.36 was assessed. The items added to Fabrice's gross estate by the Commissioner were as follows:

(a) *Janet Fabrice Trust No. 1*

75 shares of Fabart Company  
stock given to the trust by  
Fabrice

112 shares of Fabart Company  
stock purchased by the trust

187 shares at \$200 each.....	\$37,400.00	
Cash .....	805.29	\$38,205.29

(b) *Lorraine Fabrice Trust No. 1*

75 shares of Fabart Company  
stock given to the trust by  
Fabrice

112 shares of Fabart Company  
stock purchased by the trust

187 shares at \$200 each.....	\$37,400.00	
Cash .....	7,615.95	\$45,015.95

(c) *Janet Fabrice Trust No. 2*

101 shares of Fabart Company  
stock given to the trust by  
Fabrice

152 shares of Fabart Company  
stock purchased by the trust

253 shares at \$200 each.....	\$50,600.00	
Cash .....	12,987.72	\$63,587.72

(d) *Lorraine Fabrice Trust No. 2*

101 shares of Fabart Company  
stock given to the trust by  
Fabrice

152 shares of Fabart Company  
stock purchased by the trust

253 shares at \$200 each.....	\$50,600.00	
Cash .....	12,597.35	\$63,197.35

(e) *Martha G. Fabrice Trust*

101 shares of Fabart Company  
stock given to the trust by  
Fabrice

152 shares of Fabart Company  
stock purchased by the trust

253 shares at \$200 each.....	\$50,600.00	
Cash .....	16,134.85	\$66,734.85

[fol. 203]

(f) Farm Improvements .....	\$ 37,000.00
	<hr/>
	\$313,741.16

Of the \$313,741.16 added by the defendant to Fabrice's gross estate, \$186,141.16 represents property acquired by the trustees from income generated by the trusts subsequent to their creation.

In August 1954 plaintiffs paid to the Director of Internal Revenue the amount of the claimed deficiency together with interest of \$16,774.49, or a total of \$97,500.85. In August 1956 plaintiffs filed a claim for refund of the \$97,500.85 with interest thereon. The District Director disallowed this claim in April 1957, whereupon in May 1957 plaintiffs filed a protest. In September 1957 the Office of the Regional Commissioner sent to plaintiffs a notice of formal disallowance of their claim.

Three separate questions are presented by the above facts: (1) Was Fabrice's right, as a co-trustee, to distribute or accumulate income of the trusts governed by a definite external standard and thus not a power to designate the persons who would possess or enjoy the income as set forth in Title 26, U.S.C. § 811 (c) (1) (B) (ii) and (d) (1)? (2) Is income derived from the transferred property subsequent to the transfer excludable from the above mentioned statutes? (3) Did Fabrice maintain "possession or enjoyment" of the farm improvements as contemplated by Title 26 U.S.C. § 811 (c) (1) (B) (i)?

I now consider the first issue; whether Fabrice's power to distribute or accumulate the income of the trust brought the trust within the terms of § 811 (c) (1) (B) (ii) and/or (D) (1).

Paragraph (a) of Article II of each of the five trusts vests in Fabrice the power to distribute or accumulate the [fol. 204] income of the trusts. The Article and Paragraph provide:

#### Article II

"The trust estate shall be distributed both as to income and principal in the following manner:

(a) The net income from the Trust Estate shall be paid, in whole or in part, to my (herein the beneficiary was named), in such proportions, amounts and at such times as the trustees may, from time to time, in their sole discretion, determine, or said net income may be retained by the trustees and credited to the account of said beneficiary, and any income not distributed in any calendar year shall become a part of the principal of the Trust Estate."

It is the contention of the Government that the language above had the effect of permitting the settlor, Fabrice, to designate the persons who would enjoy the income and to alter the trust within the meaning of § 811, (c) (1) (B) and (d) (1) of the Internal Revenue Code of 1939. This statute provides what property shall be included in a decedent's gross estate. As far as material here paragraph (c) [as amended by Section 7 (a) of the Act of October 25, 1949, c.720, 63 Stat. 891] relating to transfers in contemplation of, or taking effect at death, provides:

(1) *General Rule.* To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

Paragraph (d) relating to revocable transfers provides:

[fol. 205] (1) *Transfers after June 22, 1936.* To the extent of any interest therein of which the decedent

has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

The government's basic contention is supported by *Industrial Trust Co. v. Commissioner*, 165 F. 2d 142 wherein the Court of Appeals for the First Circuit affirmed (and in part reversed and remanded but on other grounds), a Tax Court decision reported as *Estate of Budlong v. Commissioner* 7, T.C. 756, and 8 T.C. 284. The Tax Court had held that the power reserved by a decedent, as trustee, to accumulate or distribute the income at his discretion, amounted to a power to designate the persons who should possess or enjoy income within the meaning of § 811 (c), and as such was includable in the gross estate. Further, in construing § 811 (d), the Supreme Court in *Estate of Holmes v. Commissioner* 326 U.S. 480 at 487 stated:

"It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation. More therefore is involved than mere acceleration of the time of enjoyment. The very right of enjoyment is affected, the difference dependent upon the grantor's power being between present substantial benefit and the mere prospect of possibility, even the probability, that one may have it at some uncertain future time or perhaps not at all. A donor who keeps so strong



a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which Section 811 (d) (2) requires in order to avoid the tax."

It is obvious that the Court in construing § 811 does not [fol. 206] concern itself with property law relating to vesting of ownership, but, is interested only with who had the actual economic benefit. See also, *Lober v. United States*, 346 U.S. 335.

Plaintiff calls the Court's attention to the case of *Jennings v. Smith*, 161 F. 2d 74. The court in the *Jennings* case held that a right to alter a trust by the exercise of a power to accumulate was not within the ambit of § 811 (d) where such power was circumscribed by a definite external standard. I acknowledge this to be an accurate statement of the law, however, the trust in the *Jennings* case made the power to invade the capital subject to the trustee's determination" . . . that such disbursement is reasonably necessary to enable the beneficiary in question to maintain himself and his family, if any, in comfort and in accordance with the station in life to which he belongs." Also the power to invade the capital was exercisable if the beneficiary or his issue" . . . should suffer prolonged illness or be overtaken by financial misfortune which the trustees deem extraordinary." The wording of the *Jennings* trust make it distinguishable from the *Fabrice* trusts. The wording of the *Fabrice* trusts do not recite definite ascertainable standards restricting the trustees' right to accumulate or distribute. The exercise of this power being left to the unbridled discretion of *Fabrice*, the trusts are absent any perceptible standard.

Moreover, plaintiff's contention that the required external standard is imposed generally by the law of Illinois is without merit. The cases cited by plaintiff clearly set out fundamental principles of trust law: that a trust requires a named beneficiary; that the legal and equitable estates be separated; and, that the trustees owe a fiduciary duty to the beneficiaries. These statements of the law [fol. 207] are not particular to Illinois. Nor do these requirements so circumscribe the trustee's powers in an oth-



erwise unrestricted trust so as to hold such a trust governed by an external standard and thus excludable from the application of § 811 (c) and (d). Thus, the Commissioner of Internal Revenue properly included the trusts in decedent's gross estate.

I now consider the second issue; whether the income derived from the initial trust corpus should be distinguished from the corpus itself, and as such excluded from decedant's gross estate.

This question has been unequivocally decided by our Court of Appeals. In *Commissioner of Internal Revenue v. McDermott's Estate*, 222 Fd 665, the Court had before it a factual situation not unlike the one presently before me. The Court in affirming a Tax Court decision held that accumulated trust income, inasmuch as it was not part of the property transferred at the time of the creation of the trust, should not be included in a decedent's gross estate notwithstanding the proper inclusion of the trust corpus. The *McDermott* decision was recently cited with approval and followed by the 6th Circuit Court of Appeals in *Michigan Trust Co. v. Kavanagh*, 284 F2d 502, (Reversing 171 F. Supp. 227).

Although I am required to follow the conclusions of law stated therein I wish to note my own disagreement with the *McDermott* case. The Court of Appeals in deciding *McDermott* cited and acknowledged their reliance upon *Gidwitz v. Commissioner*, 14 T.C. 1263, affirmed, 196 F2d 813, and *Burns v. Commissioner*, 9 T.C. 979, affirmed, 177 F2d 739. In both *Gidwitz* and *Burns*, the former a 7th Circuit case, the Courts had before them factual situations distinguishable from this and the *McDermott* case. *Gidwitz* and *Burns* concerned themselves with transfers in contemplation of death. (Title 26 U.S.C. § 811 (c).)

The Courts there concluded that decedent's transfer of the property was valid and complete at the time of its [fol. 208] inception, but, that the property transferred, which would not include subsequent income, was, because of the motive of the taxpayer in making the transfer, includable in his gross estate. By contrast, the facts in the *McDermott* case and those presently before me concern themselves with situations wherein the decedent had been

deemed to have retained excessive controls and power over trust property. (Title 26 U.S.C. § 811 (d) (2).) Because of such a retention of benefits the transfer is held to be incomplete until the decedent's death. Accordingly, if the transfer was ineffective then the trust property was properly included in decedent's estate at the time of his death, (this relates back to our first issue), and also the income generated therefrom in my opinion should properly have been included.

But, notwithstanding my own beliefs on this matter, I, in obedience to the law of *stare decisis* and to my duty to follow the law of this Circuit as enunciated by our Court of Appeals, subjectively adhere to the Court's decision in the *McDermott* case. I therefore hold that the Commissioner of Internal Revenue improperly included in decedent's gross estate the sum of \$186,141.16, which sum represents the property acquired by the trustees from income generated by the trusts subsequent to their creation.

I now consider the third issue, whether in placing and maintaining improvements on his leasehold Fabrice can be said to have retained "possession and enjoyment" over the improvements. This question resolves itself on the intended meaning of the terms "possession and enjoyment" as those terms are used in § 811 (c) (1) (B) (i) of Title 26 U.S.C.

The Commissioner of Internal Revenue in determining [fol. 209] Fabrice's estate tax liability added to the gross estate value of the farm improvements. The apparent basis for this determination was the Commissioner's reliance upon the wording of § 811 (c) (1) (B) (i).

I find, that the literal terms of the Statute are clear and unambiguous. In the absence of finding a legislative desire or intention to limit the meaning or interpretation of these terms so as to restrict the application of the Statute, I must apply the Statute as objectively written. Fabrice did retain possession and enjoyment of the improvements for a period which did not end before his death, and accordingly I find the Commissioner properly included the improvements in his estate.

Further, following the law of the *situs* of the property, Wisconsin, these improvements which included farmhouse, garages, barns, silos and various service facilities would

probably be properly classified as trade fixtures. *Old Line Life Insurance Company of America v. Hawn*, 225 Wis. 627. Trade fixtures, as is the case with fixtures *per se*, are property so affixed to the land as to become an integrated part thereof. However, that which a tenant attaches to the land for the purpose of carrying on his business or trade is properly classified as a trade fixture and is treated as an exception to the law relating to fixtures. A recognition of this exception to the law of fixtures is based on a public policy intended to foster trade. A tenant has the right to remove trade fixtures prior to his surrendering possession. This right is subject to the tenant's being liable for injury to the land resulting from the removal. In the above cited *Hawn* decision the Supreme Court of Wisconsin, acknowledging some authority to the contrary, held that public policy encourages the promotion of agriculture as well as any other trade or business [fol. 210] business, and held that houses and equipment erected or brought on a farm by a tenant to further agricultural purposes were trade fixtures. Accordingly, Fabrice's improvements, which he as a tenant brought on the property for agricultural purposes, were trade fixtures. As such they could have been removed by him during his lifetime or by his estate after his death. He did retain possession and enjoyment of the improvements.

In accordance with the above findings the District Director of Internal Revenue is ordered to refund together with interest thereon that portion of plaintiff's deficiency claim payment which was based on the \$186,141.16 of property which resulted from income generated by the trusts subsequent to their creation. Counsel are directed to compute this amount and submit a judgment form within thirty (30) days to the Court for entry.

/s/ Campbell  
Chief Judge

Enter: August 2, 1963

/s/ Campbell  
Chief Judge

Date: August 2, 1963

[fols. 211-215] \* \* \*

[fol. 216]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Civil No. 58-C-76

CHARLES E. O'MALLEY, CLAUDE G. ALEXANDER and  
PETER G. FARROW, as Executors of the Will of Edward  
H. Fabrice, Deceased, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT—October 18, 1963

This action came on for trial before the Court, Honorable William J. Campbell, Chief Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiffs, Charles E. O'Malley, Claude C. Alexander, and Peter G. Farrow, ex Executors of the Will of Edward H. Fabrice, Deceased, recover of the defendant, The United States of America, the sum of \$76,841.77 with interest thereon as provided by law.

It is further Ordered and Adjudged that this Court hereby retains jurisdiction of this cause for the purpose of redetermining the deduction for attorney's fees and other expenses, if such redetermination is made necessary as a result of any rehearing or appeal.

Dated at Chicago, Illinois, this 18th day of October, 1963.

/s/ Campbell  
United States District Judge

[fol. 217] \* \* \*

[fol.218]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL—Filed December 16, 1963

The defendant, United States of America, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final Order of October 18, 1963 entered by the United States District Court for the Northern District of Illinois, Eastern Division, granting Judgment in favor of the plaintiffs and against the defendant in the above-captioned cause.

The attorneys for the plaintiffs are:

Leon Feldman, Esq.  
THOMPSON, RAYMOND, MAYER, JENNER  
& BLOOMSTEIN  
135 South LaSalle Street  
Chicago 3, Illinois

/s/ Frank E. McDonald  
FRANK E. McDONALD  
United States Attorney

[fol. 219]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

\* \* \* \*

No. 14556 September Term, 1964 September Session, 1964

CHARLES E. O'MALLEY, CLAUDE C. ALEXANDER and PETER  
G. FARROW, as Executors of the Will of EDWARD H.  
FABRICE, Deceased, PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the  
Northern District of Illinois, Eastern Division.

OPINION—October 27, 1964

Before DUFFY, SCHNACKENBERG and KILEY, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. United States of America, defendant, appeals from a judgment of the district court for \$76,841.77 with interest, against it and in favor of plaintiffs, Charles E. O'Malley, Claude C. Alexander and Peter G. Farrow, as executors of the will of Edward H. Fabrice, deceased.

The stipulated facts reveal that this action is for refund of federal estate tax paid to defendant by plaintiffs, and arises under the Internal Revenue Code of 1939, 26 U.S.C.A., § 1, *et seq.*

Edward H. Fabrice, a resident of Illinois, died on October 13, 1949. In December, 1936, and January, 1937, [fol. 220] Fabrice created five *irrevocable* trusts naming

himself and two other persons as co-trustees. The trust instruments were substantially identical except for the names of the beneficiaries and the property transferred. Fabrice's daughter Janet was the beneficiary of two of the trusts, his daughter Lorraine was beneficiary of two other trusts and his wife was to receive the benefit of the fifth trust.

Under each of the five trusts, the co-trustees retained the right to distribute or accumulate the income of the trusts and the income accumulated was to become part of the principal.

Fabrice retained no power to revoke, change or modify the terms of the trusts for his benefit or in any way by which he could ever acquire any interest in the corpus or income of the trusts.

When Fabrice died in 1949, the total assets in the trusts had a value of \$276,741.16. Shares of stock originally transferred to the trusts had a value of \$90,600. The difference of \$186,141.16 represented the value of accumulated income and stock purchased for the trust with such income. The Commissioner included the total amount of \$276,741.16 in Fabrice's gross estate, on the ground that Fabrice's power to distribute or accumulate the income of the trusts constituted a power to designate the persons who would possess or enjoy the income and to alter the trusts, within the meaning of §§ 811(c) (1) (B) (ii) and 811 (d) (1) of the 1939 Code.

The district court determined that the aforesaid parts of the 1939 Code were applicable, but held that the amount includible in the gross estate was only the value of the stock originally transferred by Fabrice to the trusts (\$90,600) and did not include accumulated income and property purchased with accumulated income (\$186,141.16). It relied on our decision in *Commissioner v. McDermott's Estate*, 222 F. 2d 665 (1965).<sup>1</sup>

The parties in this case agree that the judgment entered by the district court conforms with our holding in *McDermott's Estate*. However, defendant asks us to re-[fol. 221] ject *McDermott's Estate* on the authority of

<sup>1</sup> It does not appear that the government applied for a writ of certiorari in *McDermott's Estate*.



*Reinecke v. Northern Trust Co.*, 278 U.S. 339, 345, *Commissioner v. Estate of Church*, 335 U.S. 632, 644-6, and other cases.

After citing our holding in *Commissioner v. Gidwitz*, 196 F.2d 813, we said, in *McDermott's Estate*, at 667-8:

"\* \* \* The accumulations there involved, as in the instant case, were not part of the property transferred and were, therefore, not includible. The Commissioner in his attempt to escape our holding in *Gidwitz* argues that here 'the transfers were not complete until taxpayer's [decendent's] death since the property transferred is includible in his estate by reason of retained powers to designate who shall enjoy, under Code Section 811(c) (1) (B), and to change the enjoyment of the trust estate through a power to alter, amend or revoke, under Code Section 811(d) (1).' We think this attempted distinction is without merit. The transfer in the instant case was as complete as it was in the *Gidwitz* case. The trusts were irrevocable, with no power reserved in the settlor or trustee to revoke, change or modify the terms of the trusts for his benefit or in a manner by which he could ever acquire any interest in either the corpus or the income therefrom. He received the dividends (accumulations) on the trust corpus (corporate stock) solely in his capacity as a trustee. He was without power or right to receive such dividends in any other capacity. The fact that the trustee retained some control over the manner of handling the accumulations and their distribution does not militate against the fact that the transfer of the trust corpus was complete when made. Such control or power as was retained did not or could not result in any financial benefit to the trustee, and neither could it affect the rights of the beneficiaries in the aggregate. It could result in nothing more than the shifting of benefits and a determination as to the time of their enjoyment by the beneficiaries. It is thus our view that the Tax Court properly relied upon the *Gidwitz* case as authority for its position."



We discern that *Commissioner v. Estate of Church* is not inconsistent with *McDermott's Estate*. Church created [fol. 222] an irrevocable trust but required the trustees to pay him the income for life and, under those facts, the Supreme Court held the transfer incomplete until Church's death. In the case at bar, Fabrice had no right to receive the income or corpus during his lifetime or at his death. Nor is *Reinecke* applicable, because the trusts in that case were revocable. *Industrial Trust Co. v. Commissioner*, 1 Cir., 165 F.2d 142 (1947) and other cases relied on by defendant are not inconsistent with the disposition which we make of this appeal. The one exception seems to be *Estate of Round v. Commissioner*, 40 T. C. 970, where the decision does not cite *McDermott's Estate* or the Tax Court's contrary decision in *McDermott's Estate*, 12 TCM 481, 489, or its contrary dictum in *McGehee v. Commissioner*, 28 T.C. 412. These latter decisions cast some doubt upon the authority of *Round*, which was affirmed, 1 Cir., 332 F.2d 590 (1964), in an opinion in which the court admitted, at 595, that it was unable to agree with the Seventh Circuit.

On the other hand, *McDermott's Estate* was approved and followed in *Michigan Trust Company v. Kavanagh*, 6 Cir., 284 F.2d 502 (1960).

Although *McDermott's Estate* was decided in 1955 and the rule stated therein has never been changed by any act of Congress, we believe that it is firmly established as the law of this circuit. Under the doctrine of *stare decisis*, even if we had any doubt as to the correctness of our holding in *McDermott's Estate*, we would not be justified, because of any of the arguments advanced by defendant, in reversing that holding at this time.

In *California State Board v. Goggin*, 9 Cir., 245 F.2d 44 (1957), cert. den. 353 U.S. 961, the court remarked, at 45:

"\* \* \* This Court should respect and follow our previous opinions. The trial courts are entitled to rely upon such earlier pronouncements. \* \* \*"

In *Commissioner of Internal Revenue v. Moran*, 8 Cir., 236 F.2d 595 (1956), at 596, the court said:

“\* \* \* This court has repeatedly held, particularly in tax matters, that the decision of another Court of Appeals should be followed unless demonstrably erroneous or there appear cogent reasons for its rejection. [fol. 223] *Birmingham v. Geer*, 8 Cir., 1950, 185 F.2d 82, 85, certiorari denied 1951, 340 U.S. 951, 71 S.Ct. 571, 95 L. Ed. 686.

‘It is important that, so far as possible and particularly with respect to questions affecting the administration of taxing statutes, there should be uniformity of decision among the circuits. We would not be justified in refusing to follow the decision of the Circuit Court of Appeals in the Avalon case [*Avalon Amusement Corp. v. United States*, 7 Cir., 165 F.2d 653] unless convinced that it was clearly wrong. *United States v. Armature Rewinding Co.*, 8 Cir., 124 F.2d 589, 591; *United States v. Kelley*, 8 Cir., 110 F.2d 922, 924; *Grain Belt Supply Co. v. Commissioner of Internal Revenue*, 8 Cir., 109 F.2d 490, 492.’

“See also *Lazier v. United States*, 8 Cir., 1948, 170 F.2d 521, 526, 9 A.L.R. 2d 324.”

For the reasons which we have herein stated, the judgment from which defendant has appealed is affirmed.

JUDGMENT AFFIRMED.

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KILEY, *Circuit Judge*, concurring.

I concur in the result achieved by the majority, because I think the stability of the law in this credit requires that, generally speaking, no panel in this court ought to overrule the decision of another panel, and that only the court *en banc* should exercise this power.

I share the view of the district court, however, which reluctantly followed *McDermott* in its decision, since I have grave doubt about the correctness of the *McDermott*

decision in its reliance upon *Gidwitz*. In the *Gidwitz* case the Tax Court had found as a matter of fact that the transfer was in contemplation of death and accordingly was complete in the transferor's lifetime and thus not includible in his gross estate. There was no reservation by *Gidwitz* of any dominion over the property transferred. *McDermott*, however, as settlor-trustee, reserved the right [fol. 224] to distribute or accumulate income from the trust corpus. Yet this court held that the income was not includible in his gross estate because the transfer was as complete "as it was in the *Gidwitz* case" with no power reserved to "revoke, change or modify" the trust for the settlor's benefit or by which he could ever acquire any interest in the income from the corpus.

This holding was rejected, after analysis, by the First Circuit in *Round v. C.I.R.*, 332 F.2d 590 (1964), and its soundness has been questioned by legal scholars, LOWNDES AND KRAMER, *FEDERAL ESTATE AND GIFT TAXES*, at 434-35 (1962). The views of the First Circuit and of Lowndes and Kramer are support for the Commissioner's contention, in the case before us, that the Fabrice transfer, because he reserved dominion over the income until his death, was incomplete until the time of his death. The reservation of dominion over the income in the *McDermott* case and in the case before us is what distinguishes them from *Gidwitz*. The fact that a settlor does not or cannot benefit from the retained power is, in my opinion, immaterial to the precise question here.

\* \* \* \*

[fol. 225]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

\* \* \* \*

No. 14556

CHARLES E. O'MALLEY, CLAUDE C. ALEXANDER and PETER  
G. FARROW, as Executors of the Will of Edward H.  
Fabrice, Deceased, PLAINTIFFS-APPELLEES

*vs.*

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the  
Northern District of Illinois, Eastern Division.

JUDGEMENT—October 27, 1964

This cause came on to be heard on the transcript of  
the record from the United States District Court for the  
Northern District of Illinois, Eastern Division, and was  
argued by counsel.

On consideration whereof, it is ordered and adjudged  
by this court that the judgment of the said District Court  
in this cause appealed from be, and the same is hereby,  
AFFIRMED, in accordance with the opinion of this Court  
filed this day.

[fol. 226]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

\* \* \* \*

No. 14556

Before:

HON. JOHN S. HASTINGS, *Chief Judge*  
HON. F. RYAN DUFFY, *Circuit Judge*  
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*  
HON. WIN G. KNOCH, *Circuit Judge*  
HON. LATHAM CASTLE, *Circuit Judge*  
HON. ROGER J. KILEY, *Circuit Judge*  
HON. LUTHER M. SWYGERT, *Circuit Judge*

CHARLES E. O'MALLEY, ET AL., ETC.,  
PLAINTIFFS-APPELLEES

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the  
Northern District of Illinois, Eastern Division.

ORDER DENYING PETITION FOR REHEARING EN BANC—  
February 8, 1965

IT IS ORDERED by the Court sitting *en banc* that the  
petition for rehearing *en banc* filed by appellant herein  
be, and the same is hereby DENIED.

(Judges Kiley and Swygert voted to grant a rehearing).

[fol. 227]

UNITED STATES COURT OF APPEALS

[Clerk's Certificate to foregoing Transcript  
Omitted in Printing]

[fol. 228]

SUPREME COURT OF THE UNITED STATES

[Title Omitted]

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

